Supreme Court, U.S.
FILED
NOV 12 2003
OFFICE OF THE CLERK

No. 03-339

IN THE

Supreme Court of the United States

JOSÉ FRANCISCO SOSA,

Petitioner,

v.

HUMBERTO ALVAREZ-MACHAIN, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF

CHARLES S. LEEPER
SPRIGGS & HOLLINGSWORTH
1350 I Street, N.W.
9th Floor
Washington, D.C. 20005
(202) 898-5800

CARTER G. PHILLIPS*
JOSEPH R. GUERRA
MARINN F. CARLSON
MARIA T. DIGIULIAN
RYAN D. NELSON
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Petitioner

* Counsel of Record

November 11, 2003

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
REPLY BRIEF	1
CONCLUSION	10

TABLE OF AUTHORITIES

CASES Page

Al Odah v. *United States*, 321 F.3d 1134 (D.C. Cir. 2003), *cert. granted*, 72 U.S.L.W. 3171 (U.S. Nov. 10, 2003) (Nos. 03-334, 03-343) 4
Alexander v. *Sandoval*, 532 U.S. 275 (2001) 5
Beanal v. *Freeport-McMoran, Inc.*, 197 F.3d 161 (5th Cir. 1999) 8
Bigio v. *Coca-Cola Co.*, 239 F.3d 440 (2d Cir. 2001) 8
Bolchos v. *Darrel*, 3 F. Cas. 810 (D.C.S.C. 1795) (No. 1607) 6
Davis v. *Passman*, 442 U.S. 228 (1979) 6
Flores v. *Southern Peru Copper Corp.*, 343 F.3d 140 (2d Cir. 2003) 4, 5, 7, 8, 9
Kadic v. *Karadžić*, 70 F.3d 232 (2d Cir. 1995) 3, 8
Piper Aircraft Co. v. *Reyno*, 454 U.S. 235 (1981) 3
Tel-Oren v. *Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984) 4, 5, 6, 7
Underhill v. *Hernandez*, 168 U.S. 250 (1897) 2

STATUTES

21 U.S.C. § 878(a)(3) 9
28 U.S.C. § 1331 5
§ 1350 6

ADVISORY OPINION

1 Op. Att'y Gen. 57 (1795) 6

SCHOLARLY AUTHORITIES

William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists,"* 19 Hastings Int'l & Comp. L. Rev. 221 (1996) 6, 7

TABLE OF AUTHORITIES—continued

Page

W. Prosser & W. Keeton, *The Law of Torts* (5th ed. 1984) 6

REPLY BRIEF

Petitioner demonstrated in his opening brief that this case raises fundamentally important questions that directly affect the national security, foreign policy, and economic interests of the United States. The *amicus* filings by law enforcement officers, broad-based business groups, human rights activists, and the United States amply confirm that showing. Respondent's various attempts to dismiss the significance of the extraordinary decision below—and to justify the expansive interpretation of the Alien Tort Act ("ATA") that produced that decision—are wholly unpersuasive.

1.a. In its *amicus* filing, the United States confirms that judicial implication of a cause of action under the ATA undermines the ability of the political branches to protect the Nation's security and to control the conduct of its foreign relations. Contrary to respondent's claim, there is nothing "pretextual" about these harms. Opp. 3.

This very case illustrates the harms that the decision below will inflict on federal efforts to protect national security and combat international crime. Petitioner was held liable in damages for assisting in a plan, approved by senior government officials, to apprehend an alien indicted for murdering a Drug Enforcement Agency ("DEA") agent in Mexico. Enlisting the assistance of foreign individuals in sensitive law enforcement operations abroad is an inherently difficult task. Exposing those who provide such assistance to damages and the burdens of litigating in U.S. courts can only discourage others from assisting in the future, to the obvious detriment of federal law enforcement efforts abroad. See Brief for the United States in Support of the Petition ("U.S. Br.") at 7-8, 26. Although respondent claims that the facts of this case are "unique," he cannot explain why those who assist U.S. officials in future overseas law enforcement efforts—or in the capture of terrorists on foreign soil—would not be subject to suit and potential liability under the Ninth

Circuit's interpretation of the ATA.[1] See Pet. App. 72a n.1 (O'Scannlain, J., dissenting) ("no rational observer can honestly say that our court's holding today 'is a limited one.'").

Instead, respondent argues that this Court should tolerate such interference until an alien challenges the validity of an extraterritorial arrest authorized by the President himself, a Cabinet officer, or Congress. Opp. 3. Of course, as petitioner and the United States have shown, Congress has already authorized the DEA and the Federal Bureau of Investigation ("FBI") to make such arrests. See Pet. 27-28; Petition for a Writ of Certiorari of the United States at 17-20, *United States* v. *Alvarez-Machain*, No. 03-485 (U.S. filed Oct. 1, 2003) ("U.S. Pet."). More fundamentally, respondent's suggestion highlights the need for review. It is inconceivable that the first Congress intended to grant aliens the right to challenge the authority of the President or Congress to protect the Nation's security through extraterritorial arrests. Yet, as respondent implicitly concedes, the Ninth Circuit's construction of the ATA permits such extraordinary lawsuits.

Respondent's suggestion that various judicial doctrines afford ample protection against suits that interfere with the Executive Branch's discharge of its national security responsibilities, Opp. 3, 19-20, is baseless. Respondent cites no case in which a court has ever dismissed an ATA claim under the political question doctrine, and even the dissenters below conceded that it did not bar respondent's claim here. Pet. App. 73a n.2 (O'Scannlain, dissenting). The act of state doctrine only prohibits U.S. courts from judging "the acts of the government *of another*," *Underhill* v. *Hernandez*, 168 U.S. 250, 252 (1897) (emphasis added), not the acts of the

[1] The fact that respondent was acquitted of the criminal charges against him is no distinction at all. Under the Ninth Circuit's reasoning, petitioner would have been liable for an arbitrary arrest and detention in violation of international law regardless of respondent's guilt or innocence.

U.S. government.[2] And *forum non conveniens* principles do not preclude judicial review at all, but rather shift review to the courts of another country, see, *e.g.*, *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235, 254 n.22 (1981) (doctrine permits dismissal only where suit can proceed in an adequate alternative forum), which would profoundly exacerbate, not prevent, interference with the Executive Branch's discharge of its constitutional responsibilities. In short, because implication of an ATA cause of action interferes with the Executive Branch's ability to enforce criminal laws and to protect national security, this Court should grant the petition.

Moreover, as petitioner has shown, the mere fact of ATA litigation can cause international tensions that complicate, and sometimes compromise, the Executive Branch's ability to conduct and control the Nation's foreign affairs. See Pet. 18-19. The Executive Branch's judgments that certain prior cases did not give rise to these harms, see Opp. 20, does not change the fact that implication of an ATA cause of action *can* interfere with the conduct of foreign relations, as even the majority below admitted. See Pet. App. 18a ("human rights litigation under the [ATA] inevitably raises issues implicating foreign relations"). The potential for such interference—and the near certainty that Congress did not intend to authorize suits by aliens with such potential—further justifies review by this Court.

Finally, respondent does not rebut petitioner's showing that implication of an ATA cause of action has led the lower courts to usurp political responsibility for determining which norms of international law should be deemed binding. Pet. 14. Respondent claims that the ATA "does not and cannot enforce unratified and non-self-executing treaties." Opp. 21. But where, as in this case, a lower court relies on such treaties and on non-binding U.N. resolutions to discern a "specific,

[2] Moreover, the courts have concluded that "it would be a rare case in which the act of state doctrine precluded suit under [the ATA]." *Kadic* v. *Karadžić*, 70 F.3d 232, 250 (2d Cir. 1995).

universal, and obligatory" international norm, see Pet. 14 (internal quotation marks omitted), the court inescapably does give binding force to international instruments that the political branches have chosen not to treat as binding.

As this very case shows, moreover, enforcement of such norms also gives extraterritorial effect to U.S. law—namely, to the U.S. legal system's decision to provide *remedies* for violations of international norms that themselves include no remedies. Cf. Brief of *Amici Curiae* Lawyers Committee for Human Rights and The Rutherford Institute at 10. The decision to provide remedies for violation of such norms, however, is one that Congress, not the courts, should make. The fact that implication of an ATA cause of action leads to such "anti-democratic" violations of separation-of-powers principles, *Al Odah* v. *United States*, 321 F.3d 1134, 1148 (D.C. Cir. 2003) (Randolph, J., concurring), *cert. granted*, 72 U.S.L.W. 3171 (U.S. Nov. 10, 2003) (Nos. 03-334, 03-343), and to extraterritorial applications of U.S. law that the first Congress never intended, see Pet. 15, provide further justification for review of the decision below.

b. Contrary to respondent's claim, the lower courts and Congress have not uniformly embraced an interpretation of the ATA that produces such untoward results. Although there is no definitive division of authority among the circuits over implication of an ATA cause of action, the Second Circuit itself recently noted that the views expressed by Judges Bork and Robb in *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984) (per curiam), and by Judge Randolph in *Al Odah*, "suggest[] that the law of the District of Columbia Circuit stands in contrast to that of our Circuit." *Flores* v. *Southern Peru Copper Corp.*, 343 F.3d 140, 151 (2d Cir. 2003); see also *id.* at 153 (noting "differing perspectives among judges and scholars" over the "meaning and scope of" the ATA). In light of the fundamental importance of the issues raised by the decision below, there is no reason to await a more concrete split, which is unlikely to arise given

the ability of aliens to bring future claims in circuits of their choosing. See U.S. Br. 16. Indeed, in *Flores*, the Second Circuit joined Judges Edwards and Bork in calling on this Court to clarify the scope and meaning of the ATA. See 343 F.3d at 153 (judicial differences over the ATA's scope "can be resolved only by Congress or the Supreme Court"). *Tel-Oren*, 726 F.2d at 775 (Edwards, J., concurring) (scope of the ATA "cries out for clarification by the Supreme Court"); *id.* at 823 (Bork, J., concurring) (expressing the hope "that clarification will not be long delayed").

Nor is it true that the Torture Victim Protection Act ("TVPA") "codified" *Filartiga*. Opp. 18. If anything, the TVPA contradicts the Second Circuit's holding. Congress did not need to grant aliens an express cause of action for a very narrow category of international law violations if the ATA already provided a right to sue for violations of *all* universally recognized human rights norms. And statements in the legislative history of the TVPA, which was enacted in 1991, have no bearing on the meaning of a law enacted by a different Congress more than 200 years earlier. Indeed, in contrast to respondent's claims of congressional ratification, the Second Circuit has candidly acknowledged that Congress has *not* "definitively resolved the complex and controversial questions regarding the meaning and scope of the [ATA]." *Flores*, 343 F.3d at 153.

c. Finally, respondent's mistaken claim that implication of an ATA cause of action is correct as a matter of law, Opp. 12-15, provides no basis for denying review of this important issue. As petitioner has shown, Pet. 12-13, the ATA is phrased in strictly jurisdictional terms, and contains none of the "'rights-creating' language so critical" to implication of a cause of action. *Alexander* v. *Sandoval*, 532 U.S. 275, 288 (2001). Respondent makes much of the fact that the ATA does not use the "arising under" language of 28 U.S.C. § 1331, Opp. 12, and that the Act instead refers to "any civil action . . . for a tort . . . committed in violation of the law of

nations or a treaty of the United States." 28 U.S.C. § 1350. But if the latter language is sufficient to confer a cause of action for torts in violation of the law of nations, then it also confers a cause of action on aliens alone for any tort in violation of a treaty of the United States—whether or not the treaty is self-executing, see *Tel-Oren*, 726 F.2d at 812 (Bork, J., concurring). Respondent recognizes that such a result is utterly implausible and attempts to disavow it. Opp. 21 (ATA "cannot enforce . . . non-self-executing treaties").[3] But he nowhere explains why, if an implementing statute is necessary to sue for a treaty-based tort under the ATA, no such legislation is needed to sue for a tort based on the "law of nations."

In fact, the founding generation thought such express authorization was necessary. Respondent contends that the notion of a "cause of action" did not even exist when the ATA was adopted, *id.* at 14. But, as this Court has explained, the phrase "cause of action" can refer *either* to "the alleged invasion of 'recognized legal rights' upon which a litigant bases his claim for relief," *Davis* v. *Passman*, 442 U.S. 228, 237 (1979)—a concept first introduced in 1848, *id.*—*or* to the distinct concept of whether a plaintiff "may . . . appropriately invoke the power of the court." *Id.* at 240 n.18. The first Congress was plainly familiar with the latter concept. In fact, in 1781, the Continental Congress passed a resolution urging states to enact criminal penalties for violations of the law of nations and "'to authorise suits to be instituted for damages by the party injured.'" William S. Dodge, *The Historical*

[3] That disavowal fatally undermines respondent's reliance on Attorney General Bradford's 1795 opinion, *see* Opp. 14 n.8, because the "violation" Bradford thought redressable under the ATA was a "violation of a treaty" of neutrality. *See* 1 Op. Att'y Gen. 57 (1795). Respondent's reliance on *Bolchos* v. *Darrel*, 3 F. Cas. 810 (D.C.S.C. 1795) (No. 1607), is equally misplaced. *See* Opp. 13. The reference to the ATA in that case was dicta, inasmuch as the court had admiralty jurisdiction and the "libellant" sought restitution, 3 F. Cas. at 810-11, which is not a remedy for damages in tort. *See* W. Prosser & W. Keeton, *The Law of Torts* § 94, at 672-73 (5th ed. 1984).

Origins of the Alien Tort Statute: A Response to the "Originalists," 19 Hastings Int'l & Comp. L. Rev. 221, 227 (1996). Moreover, the author of the ATA, Oliver Ellsworth, was a member of both the Continental Congress that passed the resolution and the 1782 Connecticut General Assembly that responded by adopted a statute that authorized suits by foreign powers or subjects to remedy torts. *Id.* at 228-29, 231.[4] Thus, although the first Congress would not have used the phrase "cause of action" to refer to the concept of statutory authorization to invoke the power of the courts, the 1781 Resolution demonstrates that the first Congress understood the need for authorization to sue for a tort in violation of the law of nations, yet did not include such a right in the ATA.

In sum, there is compelling evidence that implying a cause of action under the ATA is wrong as a matter of statutory and constitutional law. The issue is profoundly important and will not benefit from further consideration by the lower courts. This Court should grant the petition to provide the clarification that Judges Edwards and Bork some time ago requested, *Tel-Oren*, 726 F.2d at 775 (Edwards, J., concurring); *id.* at 823 (Bork, J., concurring), and that the Second Circuit just recently confirmed is still needed. *Flores*, 343 F.3d at 153.

2. Review is also needed to determine the proper scope of the cause of action that the Second, Ninth and Eleventh Circuits have erroneously implied under the ATA. Despite respondent's claims of coherence and uniformity, the lower courts continue to employ a bewildering array of verbal formulations to describe the liability standards they have been forced to create. They also employ starkly conflicting methods in their efforts to give content to that standard.

As petitioner has explained, the Second Circuit has upheld ATA liability against private parties only for violations of *jus*

[4] Such an authorization, of course, would have been wholly unnecessary if, as respondent claims, the law of nations was a self-implementing part of the common law.

cogens norms—a limitation the Ninth Circuit has expressly rejected. Pet. 23-25. To be sure, the Second Circuit has never used this precise phrase in describing the standard of liability under the ATA. But in *Flores* as in earlier cases, the Second Circuit identified *jus cogens* violations, such as "official torture, extrajudicial killings, and genocide," as violations of customary international law that are actionable under the ATA. 343 F.3d at 156; see also *Kadic* v. *Karadžić*, 70 F.3d 232, 240 (2d Cir. 1995); *Bigio* v. *Coca-Cola Co.*, 239 F.3d 440, 448 (2d Cir. 2001). The Second Circuit has not embraced the lesser liability standard that allowed the Ninth Circuit to deem respondent's relatively brief detention a violation of customary international law.[5]

Indeed, in *Flores*, the Second Circuit largely rejected the Ninth Circuit's approach to determining which norms of international law are enforceable under the ATA. In stark contrast to the decision below, the Second Circuit held that resolutions of the U.N. General Assembly "are not proper sources of customary international law because they are merely aspirational and were never intended to be binding on member States of the United Nations." 343 F.3d at 165. In addition, the Second Circuit recognized that non-self-executing treaties that have not been implemented are dubious sources of binding international norms, and it declined to derive such a norm from the non-self-executing International Covenant on Civil and Political Rights, *id.* at 164, one of the documents the Ninth Circuit relied on below. Pet. App. 26a.

More fundamentally, the Second Circuit has effectively conceded that the task of identifying binding norms of

[5] The *Flores* decision, however, does add to the muddle of existing ATA liability standards by rejecting use of a "shockingly egregious conduct" standard, 343 F.3d at 158-60—a standard the Fifth Circuit expressly adopted based on an earlier Second Circuit decision. *See Beanal* v. *Freeport-McMoran, Inc.*, 197 F.3d 161, 167 (5th Cir. 1999) (citing *Zapata* v. *Quinn*, 707 F.2d 691, 692 (2d Cir. 1983) (per curiam)).

international law is hopelessly unmanageable. Such norms, the Second Circuit acknowledged, must be:

> discerned from myriad decisions made in numerous and varied international and domestic arenas. Furthermore, the relevant evidence of customary international law is widely dispersed and generally unfamiliar to lawyers and judges. These difficulties are compounded by the fact that customary international law . . . is created by the general customs and practices of nations and therefore does not stem from any single, definitive, readily-identifiable source. All of these characteristics give the body of customary international law a soft, indeterminate character, that is subject to creative interpretation.

Flores, 343 F.3d at 154 (citation, footnote and internal quotation marks omitted). These difficulties demonstrate the impropriety of implying any cause of action at all under the ATA. At a minimum, the indeterminate nature of the task and the conflicting approaches of the lower courts confirm the critical need for clarification by this Court.

3. Finally, this Court should grant the petition to review the Ninth Circuit's ruling that respondent's brief arrest and detention violated customary international law. Because that ruling turned on the Ninth Circuit's conclusion that the DEA lacks statutory extraterritorial arrest authority, petitioner is plainly entitled to seek review of the lower court's interpretation of 21 U.S.C. § 878(a)(3), notwithstanding that he "is not and was not a DEA agent." Opp. 28 n.20. And, as the United States has made clear, U.S. Br. 28; U.S. Pet. 14-26, the scope of the DEA's arrest authority—and the FBI's identical authority—*is* crucial to the federal government's anti-crime and anti-terrorism efforts. Cf. Opp. 28. Indeed, the government has shown that "[t]hreats to the Nation's security and citizenry are now, more than ever, transnational phenomena," and that the lower court's holding "threatens the government's ability to conduct necessary law enforcement

operations abroad to combat terrorism, international crime, and the flow of illegal drugs into the United States." U.S. Pet. 15-16. This Court should not countenance such significant harms simply because there is no split of authority in the lower courts on this issue.

For these same reasons, this Court should also consider the related issue of whether respondent's detention was of sufficient duration to violate international law. In defending this aspect of the decision below, respondent relies upon the same non-binding U.N. resolution and the same non-self-executing treaty that the Ninth Circuit improperly relied upon below. See Opp. 29. The lower court's finding of an arbitrary arrest and detention thus involves many of the same violations of separation-of-powers principles that justify review of that court's implication of an ATA cause of action. See Pet. 29.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

CHARLES S. LEEPER
SPRIGGS & HOLLINGSWORTH
1350 I Street, N.W.
9th Floor
Washington, D.C. 20005
(202) 898-5800

CARTER G. PHILLIPS*
JOSEPH R. GUERRA
MARINN F. CARLSON
MARIA T. DIGIULIAN
RYAN D. NELSON
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Petitioner

* Counsel of Record

November 11, 2003